STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. 16,768
	)	
Appeal of	)	

INTRODUCTION

The petitioners appeal a decision of the Department of Social and Rehabilitation Services denying their application for adoption subsidy benefits. The issue is whether the petitioners' children qualify retroactively for such assistance.

FINDINGS OF FACT

The parties have stipulated to the following facts:

1. [A] and [B] are two sisters who were born on February 2, 1989 and August 28, 1990, respectively. In May of 1991, their mother voluntarily placed them in SRS custody, with the intention of giving them up for adoption. The Department placed the children in foster care with [petitioners], residents of [Town, State]. It did so with the expectation that the [petitioners] would subsequently adopt the children.

2. Prior to the finalization of the adoptions, no one associated with SRS ever advised the [petitioners] that they were eligible for adoption assistance.

3. In June of 1991, [petitioners] adopted [A] and [B] in the probate court in Rutland County.

4. On May 25, 2000 the [petitioners] filed with the Department an application for benefits available under the Vermont Adoption Assistance Program ("Program"). The Department administers the Program for the purpose of providing federal and state assistance to promote the adoptions of special-needs children. As the

administrator of federal funds, the Department is bound to comply with the federal regulations governing the application and eligibility for Program participation.

5. As it pertains to this case, the Program provides for the reimbursement of non-recurring expenses and for on-going adoption assistance, including Medicaid.

6. The children fell within the federal definition of "children and with special needs" because they were a sibling group. With the exception of the application requirement addressed below, the children met all of the other Program requirements.

7. Federal Program regulations provide that, to qualify for adoption-assistance, the agreement between the administering state agency and the prospective adoptive parents must be signed prior to the entry of the final decree of adoption. Consequently, in a letter dated October 10, 2000, Diane Dexter, Vermont's Adoption Chief, notified the [petitioners] that the Department was denying their application for adoption assistance, solely because the adoptions had been finalized prior to the date that the [petitioners] had filed their application for benefits.

8. As the Human Services Board has acknowledged in prior matters (see, e.g., Fair Hearing No. 14,739; Fair Hearing No. 16,326) the federal agency responsible for administering the Program has issued a policy interpretation memorandum ("PIQ") addressing the question of an applicant's eligibility for Program participation when the failure to timely make application for benefits was induced by the adoption agency's failure to advise the applicant of the availability of the Program benefits. Essentially, while the state agency administering the Program cannot, on its own initiative, circumvent the federal requirement that the reimbursement agreement be filed prior to the finalization of the adoptions, the applicant's lack of notice of Program eligibility may be considered an "extenuating circumstance" that justifies a fair hearing. The fair hearing officer may then determine whether the lack of notice is grounds for determining that the applicant was erroneously denied benefits.

9. In this case, the parties agree that the [petitioners] would have received the subsidy benefits if they had timely applied for them. They further agree that the [petitioners] were never apprised of their right

> to apply for such benefits. The parties have entered into this stipulation to assist Board in reaching a determination that "extenuating circumstances" exist in this case and that the [petitioner's] are entitled to an award of up to $2,000 in non-recurring expenses related to the adoption of the children and an on-going adoption subsidy agreement that will provide the family with Medicaid, Title XX block-grant services, and a monthly stipend of $623.85 per month per child. The parties further agree that the [petitioners] are entitled to past Title IV-E adoption subsidy payments totaling $44,460.00. This reflects the entire agreement of the parties with regard to the [petitioners] entitlement to any retroactive or future adoption subsidy payments or benefits from the Department.
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> 10. The parties agree that, from the time of their adoption until the present, the children have met the criteria for eligibility for Title IV-E subsidy.
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> 11. The parties request that this determination be made on the undisputed documentary evidence that has been submitted by the parties and without the need for further hearing.

ORDER

The decision of the Department denying the petitioners adoption subsidy benefits is reversed.

REASONS

The parties agree to the following legal analysis. The starting point for such analysis is the federal statute that created the adoption assistance program. 42 U.S.C. § 673 includes the following:

Adoption assistance program

(a) Agreements with adoptive parents of children with special needs; State payments; qualifying children; amount of payments; changes in circumstances; placement period prior to adoption; nonrecurring adoption expenses

. . .

(2) . . .a child meets the requirements of this paragraph if such child--

(A)(i) at the time adoption proceedings were initiated, met the requirements of (AFDC eligibility) or would have met such requirements except for his removal from the home of a relative. . .either pursuant to a voluntary placement agreement with respect to which Federal payments are provided. . .or as a result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child,

(ii) meets all of the requirements of subchapter XVI of this chapter with respect to eligibility for supplemental security income benefits, or

(iii) is a child whose costs in a foster family home or child care institution are covered by the foster care maintenance payments being made with respect to his or her minor parent. . .

(B)(i) received aid under the State plan (for AFDC) in or for the month in which such agreement was entered into or court proceedings leading to the removal of such child from the home were initiated, or

(ii)(I) would have received such aid in or for such month if application had been made therefor, or (II) had been living with a relative. . .within six months prior to the month in which such agreement was entered into or such proceedings were initiated, and would have received such aid in or for such

month if in such month he had been living with such a relative and application therefor had been made, or

(iii) is a child described in subparagraph (A)(ii) or (A)(iii), and

(C) has been determined by the State, pursuant to subsection (c) of this section, to be a child with special needs.

. . .

(c) Children with special needs

For purposes of this section, a child shall not be considered a child with special needs unless--

(1) the State has determined that the child cannot or should not be returned to the home of his parents; and

(2) the State had first determined (A) that there exists with respect to the child a specific factor or condition (such as his ethnic background, age, membership in a minority or sibling group, or the presence of factors such as medical conditions or physical, mental, or emotional handicaps) because of which it is reasonable to conclude that such child cannot be placed with adoptive parents without providing adoption assistance under this section or medical assistance under subchapter XIX of this chapter, and (B) that, except where it would be against the best interests of the child because of such factors as the existence of significant emotional ties with prospective adoptive parents while in the care of such parents as foster child, a reasonable, but unsuccessful, effort has been made to place the child with appropriate adoptive parents without providing adoption assistance under this section or medical assistance under subchapter XIX of this chapter.

The above criteria can be summarized as requiring that to be eligible for adoption assistance a child must 1) be either ANFC or SSI eligible at the time the adoption proceedings are initiated; 2) be receiving or eligible for ANFC at the time of the adoption assistance agreement or the court proceedings removing the child from the home; and 3) have "special needs"--i.e., cannot return to live with its parents, have a medical or situational handicap, and because of that handicap cannot be placed for adoption without providing adoption assistance payments.

Federal regulations implementing the above provisions further provide:

> The adoption assistance agreement for payments pursuant to section 473(a)(2) must meet the requirements of section 475(3) of the Act and must:
>
> (1) Be signed and in effect at the time of or prior to the final decree of adoption. A copy of the signed agreement must be given to each party. . .
>
> 42 C.F.R. § 1356.40 (b).

The above regulation makes it clear that to be eligible for the adoption assistance program an adoption assistance agreement between SRS and the adopting parents "must...be signed and in effect at the time of or prior to the final decree of adoption". There is no question in this matter that the petitioners did not apply for adoption assistance until several years after their children’s adoptions were finalized.

However, the petitioners argue that their children should be found to be eligible retroactively because the Department failed in its duty to advise them of the existence of the program and that they were prevented by that breach of duty from participation in a program for which they were otherwise eligible and which their children need now.

The federal agency responsible for administering this program, the U.S. Department of Health and Human Services, has issued two policy interpretation memoranda (called PIQs) addressing this question. The first PIQ, ACF-PIQ-88-06 issued December 2, 1988, stated that if there are "extenuating circumstances" adoptive parents may request a fair hearing to demonstrate that "all facts relevant to the child's eligibility were not presented at the time of the request for assistance." If they make that showing, "the State may reverse the earlier decision to deny benefits under title IV-E." Because that directive dealt only with parents who had made an application which may have been erroneously denied, a second memoranda was issued on June 25, 1992, ACF-PIQ-92-02, addressing further questions, including the state's failure to notify parents of the availability of adoption assistance:

> QUESTION 3:
>
> Would grounds for a fair hearing exist if the State agency fails to notify or advise adoptive parents of the availability of adoption assistance for a child with special needs?

RESPONSE:

Yes. The very purpose of the title IV-E adoption assistance program is to encourage the adoption of hard-to-place children. State notification to potential adoptive parents about its existence is an intrinsic part of the program and the incentive for adoption that was intended by Congress. Thus, notifying potential adoptive parents is the State agency's responsibility in its administration of the title IV-E adoption assistance program. Accordingly, the State agency's failure to notify the parents may be considered an "extenuating circumstance" which justifies a fair hearing.

. . .

QUESTION 5:

May a State establish policies defining the factual circumstances which constitute an extenuating circumstance for the purpose of a fair hearing?[1]

It is permissible for States to have written guidance regarding the types of situations which would constitute the grounds for a fair hearing in order to assist fair hearing officers. However, State policies may not define the grounds for a fair hearing more narrowly than Federal policy. . . The types of situations which would constitute grounds for a fair hearing include:. . . (4) failure by the State agency to advise adoptive parents of the availability of adoption assistance.

If applicants or recipients of financial benefits or service programs under titles IV-B or IV-E believe that they have been wrongly denied financial assistance or excluded from a service program, they have a right to a hearing. It is the responsibility of the fair hearing officer to determine whether extenuating circumstances exist and whether the applicant or recipient was wrongfully denied eligibility.

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[1] Note: Vermont has not established such a definition.

QUESTION 6:

May a state agency change its eligibility determination and provide adoption assistance based upon extenuating circumstances without requiring the applicant to obtain a favorable ruling in a fair hearing?

RESPONSE:

No. However, if the State and the parents are in agreement, a trial-type evidentiary hearing would not be necessary. The undisputed documentary evidence could be presented to the fair hearing officer for his or her review and determination on the written record.

QUESTION 7:

Who has the burden of proving extenuating circumstances and adoption assistance eligibility at a fair hearing?

RESPONSE:

The Federal statute does not address the point explicitly. We would expect States to conclude that the adoptive parents have the burden of proving extenuating circumstances and adoption assistance eligibility at a fair hearing. However, as stated in the previous response, if the State agency is in agreement that a family had erroneously been denied benefits, it would be permissible for the State to provide such facts to the family or present corroborating facts on behalf of the family to the fair hearing officer.

It is under the interpretations found in these final two questions that the parties come before the Board in this matter and present their agreed upon facts. SRS agrees both that the petitioners would have gotten the subsidy benefits if they had applied and that they were never advised of their right to apply for such benefits during the adoption process. The sole question before the Board, then, is whether these

facts constitute "extenuating circumstances" so as to justify a retroactive finding of eligibility.

An Ohio trial court (Calmer v. Ohio Dept. of Human Services, et al, Case No. 188051 [Court of Common Pleas, 1991]) has determined that just such a set of circumstances as exist in this case constitutes "extenuating circumstances" needed to justify a retroactive finding of eligibility because the provision requiring signing of the agreement before finalization cannot be used to deny eligibility in cases in which the state agency has itself violated the law by not informing the adoptive parents of the existence of the adoption assistance.

The Ohio court's analysis, which has been adopted by the Board in similar cases[2] is whether there are "extenuating circumstances" so as to estop the agency from denying benefits now. The Vermont Supreme Court has held that the Board has the authority to apply the equitable doctrine of estoppel in cases before it and to examine whether the Department involved had a duty to the petitioner which it has breached and which has led to unfair treatment of the petitioner. Stevens v. DSW, 159 VT 408 (1992).

The four essential elements of estoppel to be met in this case are:

[2] See Fair Hearing Nos. 14,739 and 16,326.

> (1) the party to be estopped must know the facts; (2) the party to be estopped must intend that its conduct shall be acted upon or the acts must be such that the party asserting the estoppel has a right to believe it is so intended; (3) the party asserting estoppel must be ignorant of the true facts; and (4) the party asserting estoppel must detrimentally rely on the conduct of the party to be estopped.
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> Id, p. 421, citing Burlington Fire Fighters' Ass'n v. City of Burlington, 149 Vt. 293,299, 543 A.2d 686, 690-91(1988)

In this matter, the parties have agreed to facts that show that all of the above elements have been met. SRS was aware of the existence of the adoption subsidy program in the months preceding July of 1999, and agrees that it had an obligation to inform its potential adoptive parents of the existence of the program. (This obligation is specifically confirmed by HHS in the interpretive memorandum, ACF-PIQ-92-02 above at Question 3.) SRS knew or should have known that its failure to notify parents meant that the parents would not apply for such assistance. The parents in this case did not know of the existence of the subsidy and based on this lack of knowledge did not apply for the program to the detriment of their children in terms of their ability to receive medical and other services they may need.

As the petitioners have shown, with the candid and laudable assistance of SRS, that all of the elements for estoppel prescribed in Stevens, supra are met, it must be found that "extenuating circumstances" exist in this case and

that SRS is estopped from enforcing the requirement of a signed subsidy agreement prior to finalization of the adoption against the petitioner. As there is no further bar to their eligibility for adoption subsidy benefits, those benefits must be granted to them.

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